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SYMPOSIUM: CLINICAL RISK AND JUDICIAL REASONING

The Classic

Report of the Committee on Suits for Malpractice

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Abstract This Classic Article is a reprint of the original work by E. F. Sanger, Report of the Committee on Suits for Malpractice. An accompanying biographical sketch of E. F. Sanger, AM, MD, is available at DOI 10.1007/s11999-008-0640-6. The Classic Article is ©1879 and is reprinted with courtesy from Sanger EF. *Report of the Committee on Suits for Malpractice*. Trans Maine Med Assoc.1879;6:1–22.

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At the annual meeting of the Maine Medical Association in 1875, the President, Dr. T. H. Brown, in his inaugural address, suggested the necessity of a law on malpractice, "requiring the plaintiff to give bond to pay costs, expenses and damages if he failed to establish his charges and obtain a verdict."

In my inaugural address in 1877, I repeated Dr. Brown's suggestions, and recommended that a committee be appointed to petition the next legislature for an Act to protect the science and art of medicine and surgery, animadverting upon members of the Association who encouraged or become partizans to malpractice suits. Drs. S. H. Weeks, H. H. Hill and A. J. Fuller were appointed on that committee.

A petition of several hundred names, with the preamble and bill, embodied in your committee's report, was referred to the Judiciary Committee of the legislature. They reported, in substance, the following bill: "An act to prevent vexations lawsuits." "In all actions for injuries to the person, the Court may order the plaintiff to give bond to the defendant for the payment of all costs which shall be recovered against him." This Act passed the Senate, but was killed in the House by the violent attack of a pettifogger upon surgeons and railroad corporations, on the very heel of the session, when it was too late to freely discuss the bill.

At the annual meeting of 1878, I read an article on "Malpractice." and presented the following resolutions, which were unanimously adopted: 1st. "With the existing State law on civil malpractice, it is unsafe to practice surgery among the poor." 2d. "A committee of five be chosen by this Association to petition the Legislature for proper legislation." The following committee was chosen: Drs. S. H. Weeks, Portland, E. F. Sanger, Bangor, George E. Brickett, Augusta. S. C. Gordon, Portland, and M. C. Wedgewood, Lewiston. By the courtesy of Dr. S. H. Weeks, I was authorized to make out this report.

The same preamble and bill, in substance as follows, was presented to the last Legislature. "That, in an action for malpractice against a *graduate in medicine and surgery*, upon the affidavit of the defendant that he believes that the plaintiff is not responsible for costs, the Court shall order the plaintiff to give bond for the satisfaction of any judgment of Costs that may be rendered against him." This bill was endorsed by nearly 6,000 petitioners. These petitions

were, unfortunately, referred to the Judiciary Committee, composed entirely of lawyers who were interested in killing the bill, because it restricted litigation and injured their business. The notice to appear before this committee was too short to give your full committee time to be present. By a strange coincidence, which had too much method for madness, a pettifogger,—who had previously boasted that he was "going for these doctors," had brought several unsuccessful malpractice suits without pay, and threatened others,—appeared to remonstrate. It looked like a cut-and-dried thing, and augured ill for our bill, as it proved by the summary way with which the prayer of nearly 6,000 of our most influential citizens was disposed of.

To our portrayal of the constant exposure of the surgeon to prosecution, the positive damage done science by these perpetual menaces and alarms, the infrequency of verdicts, which were absorbed in legal fees and expenses, the danger that the medical profession might combine to exclude the poor from the benefits of surgery, that the statutes actually held out inducements for the poor to sue for damages, and that the Bar was protected by special laws, the committee did not raise any constitutional objections, but met us with the laconic rejoinders that the legislation asked was special or class, that the law giving the poor the unlimited right to prosecute, and not be made responsible for judgments of costs, was a *general* one, and that doctors were a quarrelsome set who *buried* their mistakes.

Our reply that all general laws had exceptions, of which the class protection of the lawyer was a notable example, that lawyers *hung* their mistakes, and were too cunning to quarrel among themselves, met with no response. Without deliberation, we were granted leave to withdraw, and the bill was prevented, even on a minority report, from coming before the Legislature for open discussion, where it had many warm and appreciative friends.

This committee spurned the petitions of nearly 6,000 intelligent citizens of Maine; the high and the low, the rich and the poor, representing every trade and profession, from every grade of society, who believed that the interests of the State, of society and humanity, demanded that a science like medicine, beset with risks and dangers, could not flourish or encourage its votaries to a high degree of excellence, unless it was fostered and protected by the State. The petitions would have assumed mammoth proportions if it had been deemed necessary, as every member of the profession who circulated them reported that every one asked, signed, with the exception of a few political demagogues, adventures and lawyers. The worthy poor, in particular, signed them, as they said the only way for them to get first-class surgeons was to protect them against villainous attacks.

For the past month I have renewed my researches on threatened and instituted malpractice suits, and find the impression prevails with the medical profession that such troubles come from the *ignorant* and *vicious* poor, who are aided and encouraged by *meddlesome lawyers* and *doctors*; the former for the fees which they may get by pushing the doctor to the settlement of a vexatious affair; the latter to avenge fancied wrongs and gratify a rankling and canker-ous jealousy and envy. The poor rarely get a verdict, and, when they do, they realize nothing, while the prosecuted doctor becomes well nigh ruined by the *expenses* of a successful defence, which he cannot recover from his accuser by the present law, as it makes no provisions for the payment of the judgement rendered for costs wrongfully inflicted. Many worthy and experienced surgeons have abandoned or are deterred from the practice of surgery, on account of the distrust which law and public sentiment manifest in their skill and intelligence, by these repeated tests, without providing any protection to the innocent or remedy for the injured.

By continued investigation, I find the profession of this State has been sued for $489,141, paid out within bounds $50,000, and the Counties nearly twice as much more, in malpractice suits. Ten surgeons have been convicted, one in ten of those sued. Seven-eighths of the plaintiffs have been unable to pay taxable costs which were saddled upon the innocent surgeons, who were forced to defend and pay, whether able or not, or to be convicted by default. One surgeon, too poor to defend, was convicted without trial, and the judgment hangs over him still. It was attempted in another case, where the surgeon indignantly refused to defend, but the moral courage of the Court failed.

Fourteen surgeons settled by paying $3,333. The plaintiffs were all irresponsible. Three suits had been tried eight times before settlement. Fees and expenses probably absorbed the whole, as settlement or verdict was the lawyer's only hope of remuneration. One defendant paid out $2,000 in litigation, and then settled for $125; a second settled by paying $25 and costs, amounting to $250, after a new trial had been granted, on a verdict for the plaintiff; a third paid $350 to satisfy all parties after a disagreement of the jury, conclusively proving that not much gets into the poor patient's pocket. After a disagreement in one of my cases, the prosecuting lawyers offered to settle for fees. I finally won, and the lawyers went a begging.

Verdicts were rendered against Dr. GROVER for $ 1,525. at at an expense of $975 to the doctor, and Dr. ALBEE for $1,000, the two highest verdicts ever rendered in the state, and the only ones of any amount ever paid. These cases were hotly contested, the latter being on trial fifteen and one-half days, at a cost to ALBEE of $1,170; his lawyer's fees alone being $700. The verdicts rendered against the ten surgeons amount to $4,828. The taxable costs were $2,342. Deducting the two heaviest verdicts, it left only $2,303 to pay lawyer's fees, incidental expenses, and be distributed among eight plaintiffs. The verdict against Dr. CHASE's

estate, for amputation, was $200, which the plaintiff admits did not meet expenses, proving that lawyers cut too deep sometimes. After the lawyers were paid, it will be plainly seen that a very small amount was left, *per capitum* to pay the inevitable expenses, outside of taxable costs.

Fifty-six surgeons who defended their skill against fraudulent claims for damages amounting to $356,315, had to pay out $31,784, because the plaintiffs could not pay Court costs and had become hopelessly ruined by lawsuits, which never would have been brought had the laws been framed in the interest of justice and right, so as to make every man accountable for the taxable costs of the suits that he could not maintain. The medical profession has bled freely, to gratify the popular idea that the free American citizen should enjoy the luxury of testing the skill of the educated surgeons in Courts of law, at the surgeon's expense, without money or price.

Among the seventeen fractures of the thigh bone, including two within the capsule, the amount of shortening was reported in eight cases, namely: half-inch in Drs. Hazen's and Warren's; three-fourths in Dr. Loring's; one in Drs. Anderson's and Stevens'; two in Dr. Jefeerds', within the capsule; two in Dr. Campbell's and three in Dr. Seavey's. In Dr. Tingley's case, upper third; shortening and kind of deformity not stated, verdict $103, Court cost $122. Concluded that the climate was not congenial, so left the State without paying the execution. Dr. Ceshman's comminuted fracture of the lower third in a young female. Previous necrosis of the femur, reflex contraction and anchylosis of the knee existed. Fracture caused neither shortening nor deformity. The doctor sued his bill for services, $33. Plaintiff, at time of trial, proposed to enter both cases neither party; settled. It cost the doctor $25 and the grandfather $100. In Dr. Hazen's case, fracture of the upper third, extension used; accidentally refractured about the eighth week; same treatment until callous formed, then starch bandage; plaintiff offered to settle for $100. Told them to go to h—ll. Lawyer's bill $35. Was convicted by default; $350 verdict; refused to defend a put up job. Dr. Warren's upper third, lacerated integuments; double inclined plane used; shortened one-half inch. Three months after, fell and refractured. Treated by another physician. Shortening at time of suit, four inches. Was sued both in State and U. S. Courts, where plaintiff had to give bond for costs; acquitted. Cost the Doctor $500; the plaintiff, his farm and bank account. Served him right. Dr. W. B. Small's case, fracture of the upper third of the thigh, never came to trial. "Scared him out of his bill and I think his life." One case was reported where patient walked on the 28th day, causing shortening and deformity; settled for $500. Dr. Seavey's case, angular deformity and shortening, middle third; double inclined plane used; action dropped. Dr. Rowell's within the capsule; verdict $1,600; new trial granted; settled for $25; Dr. Campbell's dismissed on the 31st day; commenced using her limb shortly after; verdict $550. The doctor reports no shortening on the 31st, when dismissed. Had not used extension, as there was no retraction. Dr. Blake's lower third; no shortening or deformity on the 21st day. Patient moved, under remonstrance, eight miles, and never was visited again. The doctor refused to defend; action dropped. Now over ninety years of age. Dr. Anderson saw his case only twice as counsel. Non-suited on the evidence of the plaintiff that bandages were loosened. Cheated the doctor out of his bill of costs, by deeding his farm to his lawyer. Cost doctor $500. Lawyers and doctors put up the suits in five cases.

Among the nineteen fractures of the leg, six were complicated by fracture or dislocation through the ankle. Drs. Fuller, Hersom, Hildreth, Libry, Richards and Small's cases, and one through the tuberosity of the knee-joint, Dr. Prescott's. Impaired motion and deformity followed as a natural consequence. Five were acquitted. In Dr. Feller's case, there was loss of motion, atrophy and gangrene of toes. He was sick at the time; died before the trial; action dropped. Gangrene may occur in such cases, without tight bandaging, Dr. Prescott saw his case but once; verdict $400; costs $600. Plaintiff's lawyers took case on shares and got three-fourths of the verdict.

Bandages loosened by patients in Drs. Todd, Jones, Milliken and Seavey's cases. The two former were acquitted; latter, action dropped. No shortening in Todd's; slight lateral displacement. Shortening of an inch in Jones' and Springall's cases; hardly perceptible in Seavey's. Jones found bandages loosened on second visit, and refused to treat the case; fracture of the lower third. Lawyers offered to settle for fees after first trial and disagreement; acquitted. Springall's lower third; got on to crutches, and dismissed the Doctor the third week; lawyer took the case on contract. In Dr. Bennett's, shortened one-third of an inch; action dropped. Drs. Plaisted and Porter settled for $300. Dr. Allen was convicted for $200; saw the case in consultation; lawyers absorbed the verdict; cost the doctor $600. Dr. Burbank's case, compound fracture of the leg; bone protruding, reduced; patient left town next day contrary to instructions; never saw case again; action dropped.

In Dr. Grover's case, seat of fracture not to be found at the trial; no shortening; leg a little crooked; female. Discovered the bend too late to re-adjust without refracturing. Had three trials and a reference; acquitted; cost the doctor $800; never could collect bill of costs, $350; lawyer took case on shares. Years after, learned that the patient had walked on the leg the second day after the starch bandage was applied.

The Hon. A. Grover, his son. writes, "The physician is made responsible and to blame for the disease or injury, to begin with, and to be charged with the patient's cure."

In J. M. SMALL's case compound fracture of the ankle, saw patient but once; acquitted; cost plaintiff $2,500 for his experience. In Dr. RICHARDS' fracture and dislocation of ankle, found too much swollen and bruised to be reduced, and promised to come again, but was dismissed; saw in consultation; acquitted. In seven cases, lawyer or doctor encouraged the suit.

Among the twelve fractures of the arm and forearm, six were through the joints, namely: Three of the olecranon; Dr. NOURSE's partial anchylosis; acquitted. Dr. H. G. ALLEN's, stiff joint; lawyer offered to settle for fees; paid $100; and Dr. H. SMALL's, useful motion. verdict $300. One compound fracture of the elbow, Dr J. M. SMALL's; good result; plaintiff nonsuited. One compound fracture of the ulna and dislocation of the radius at the wrist, Dr. DAM's; tight bandaging, gangrene and amputation of the arm. One fracture of the condyles, Dr. ALBEE's; tight bandaging, sloughing of forearm near the elbow, amputation of the arm. One of the ulna, middle third, false joint, and final recovery by an operation, Dr. RUSSELL's; was arrested, body attached and bonds given. The doctor sued bill for services; both finally entered neither party. One of the ulna with lacerated muscles, Dr. SAWYER's; good motion; slight prominence at the seat of fracture; acquitted. Lawyer encouraged the case; lawyer offered to settle in one case; doctor false in another.

Among the seven amputations, one of the thigh, Dr. GROVER's sued because he did not re-amputate at the hip joint instead of the upper third. His only medical witness was in South America, and he was denied a new trial. Two of the forearm; Dr. CARR's, poor stump; acquitted; never could collect his execution for costs of $1,000; Dr. CHASE's short flap and re-amputation. Four of the leg; Dr. BENSON's syphilitic osteophytes; plea unnecessary; Maine General Hospital's amputation of conical stump now pending. A third case, good result; amputation considered unnecessary. "Lawyer principal factor;" settled; paid $50.

Among the eight dislocations, three of the thigh, two were unreduced, and one, Dr. JONAH's, reduced and thrown out again; paid $100 to avoid a trial. Three of the elbow, all unreduced; Dr. BULLARD's, verdict $250; not discovered for three weeks, then irreducable, joint swollen, and patient refused examination at the time of the accident; one of the radius, Dr. TIBBETTS', paid $800; one, Dr. LEWIS', impaired motion. One of the shoulder, Dr. PERRY's, partially reduced; refused further aid. This action was against an estate; acquitted. One compound of the ankle, Dr. SWAZEY's; impaired motion; non-suited on plaintiff's evidence.

There was one suit for inversion of the womb, following flooding and removal of the placenta after confinement. The doctor was called away and never saw the case again. On the third day, protrusion discovered; pronounced and treated by mistake for rupture of the womb. Fourteen months afterwards it was amputated. Action dropped. Dr. CORSON's suit is now pending, charged with relapse of typhoid fever from imprudent eating. The lawyer ordered the sheriff to arrest and hold the body.

Suits have been brought for the abscesses and adherent tissues following phlegmonous erysipelas, hip disease following injury, opening of the sinuses of white swelling, cancerous disease of the shoulder, the different theories of treating club feet, and the untoward results of incurable diseases. In all such cases, the doctor, whether possessed of the means or not, must submit to one of three things: either to fee lawyers, and receipt bills for medical services, or be arrested, with the chances of going to jail to await trial, or have property attached, with a desperate struggle to protect it and his reputation. If he stands trial, though acquitted, he has to pay his own costs in seven-eighths of the suits brought.

Except in metropolitan cities, the doctor acquires a moderate competency, by dint of toil, devotion and self denial. The cost of a single lawsuit, wrongfully prosecuted, may sweep away the earnings of years, and the reputation upon which he depends to meet the daily wants of life. Acquittals and convictions are accidental at best, and leave a stain behind which often force meritorious surgeons to abandon this State for States like New York and Ohio, where medical societies have a voice in the fitness of practitioners, in Illinois, where none can practice without a diploma, in New Hampshire and Vermont, where Medical Boards are appointed by the State to examine itinerants and new comers, or even Massachusetts and Michigan, where plaintiff has to give bond for taxable costs. One physician in this State ran away from an unjust verdict. The State, however, can come down on us like a thief at night, and hold any of us, by incarceration or bail bond, for trial.

Our surgery is chiefly among the laborers and mechanics, and does not pay a reasonable insurance upon the risk run. Dr. GROVER had arrived at the ripe old age of sixty-five or sixty-seven, and acquired a small competency by an extended medical and surgical practice of more than forty years, when he was sued and put to $3,300 costs for two prosecutions; one where his surgical assistant could not be reached in South America to justify a re-amputation; one where the patient confessed to disobeying directions years afterwards. "The execution was satisfied by a sale of personal property and a levy on real estate." It hurt his reputation and "seriously drew upon the purse." He had two sons in College and two preparing. The youngest, Gen. GROVER, he got into West Point on account of this financial embarrassment. Dr. GROVER rode eighty miles and performed the two amputations for which he was convicted, for forty dollars. He charged twelve dollars to treat the fracture, which cost him three trials and a reference. At the time of his acquittal. The medical referees had but one fault

to find, "The miserable pittance he had charged." The doctor amputated two other thighs for $10 and $15.

I selected eighteen consecutive cases from my books, six amputations, six fractures and six removals of cancerous growths, and found I made 237 visits, travelled 764 miles, and received $288.50 pay, about the wages of a mechanic. I incurred the risks of being sued for $150,000 and paying $18,000 costs and fees. Drs. McRuer and Rich, the two most distinguished surgeons ever settled in eastern Maine, aside from the appreciations of their homesteads from war causes, after an almost uninterrupted practice of fifty and sixty years, respectively, died comparatively poor. The friends of the former raised the mortgage on his house after thirty years of practice; and the latter after twenty years, being unable to pay a grocer's bill, agreed to tend his daughter, recently married, in all her confinements. She had eight children. The husband thought the doctor paid a good smart interest on his bill.

Among the one hundred and eighty-eight threatened and instituted malpractice suits, one hundred and one were for fractures alone: twenty-two being of the thigh and thirty-two of the leg. There were fourteen dislocations and thirteen amputations. In many of the threatened cases, the surgeons remitted their bills, or paid small sums to avoid trouble. In fractures of the thigh, one receipted his bill, $35; two let them outlaw, one for $75. In fractures of the leg, one paid $100; a second paid $50 and bill of $50; four let their bills outlaw for $50, $22, $98, and $30. In fractures of the wrist, three let their bills outlaw; one remitted fifty per cent., and another when threatened, suggested a warmer climate to his patron. In fractures of the arm, one paid $100, one $250, one bill outlawed, $50, and a fourth sued a bill of $20, got judgment of $10, and paid $140 costs; a fifth fracture of the neck of humerus, paid $75 and gave bill $75, "to avoid the expense and anxiety of a suit with an irrepressible man." In fractures of the elbow, three lost bills of $100, $25, and one gave a cow besides, which gave the milk of human kindness, probably. In fractures of the clavicle, one lost bill. Amputations of fingers and thumbs, three remitted bills, $10, $40 and $32. In *post partem* hemorrhage, husband threatened "pig tamages" because recovery was slow. In case of confinement and loss of one of the twins, gave bill. In ruptured perineum, threatened, but finally settled. Radical cure of hernia, gave bill $20.

The fractures were of the lower extremities in fifty-four cases, the shortening being about the average amount. Bilateral measurements of the human frame show great variations in the length of the lower extremities. Dr. Cox, in the measurements of fifty-four persons, found in forty-eight cases the length varied from one to seven-eighths of an inch. Dr. Wight, in sixty measurements, found the lower limbs of the same length in about one case in five, the difference being from one-eighth to one and three-eighths inches. Dr. Roberts, in his bilateral measurements, found asymmetry the rule in the femora and tibiæ of eight skeletons. If the sides of the human body are not symmetrical, if the lower extremities differ in length from one-eighth to an inch in more than seventy per cent. of the human race, if a shortening of three-fourth of an inch from fractures can not be detected in the gait, if the lacerated and fractured human tissues cannot be made natural, cannot be perfectly restored in length, size and straightness, it becomes a delicate question to decide *when* a limb is properly set, and whether the surgeon, in making them of *equal length* and *straightness*, may not be guilty of malpractice. Can a jury decide whether it is a *natural* bend or shortening?

I have collected thirty-four instances where responsible surgeons have refused to visit surgical cases among the poor, and if time permitted to peruse my investigations, could enumerate an infinite variety of expedients resorted to by kind hearted and yet timid surgeons, to avoid surgery among the poor, not on account of poor pay, but to avoid the vexation of threats, arrests, attachments and slandered reputation, by the horde of cormorants who hang around our Court House for the thrifty surgeon. I will quote a few expressions written to me by some of the best surgeons in this State.

"Gave up fractures on account of State law." "Have given up surgery for the past four years." "The false impressions as to the surgeon's duty deter me from tending surgical cases among the poor.' "Henceforth, before undertaking anything of the kind, I shall be secured against all liabilities." This surgeon controls the surgery of his section. "Refuse surgery among the poor, because they expect an improvement on the original." "I tell such to go where they don't rake up fires nights." "Surgery among the poor gives great anxiety." "It requires a bold and reckless man to undertake surgery." "Don't average one-quarter as much from surgery as medicine." "About giving up surgery among the poor." "Shall give up surgery unless protected." "Lose half of my surgical bills." "Fifty per cent. of surgery is poor." "I always fear to undertake surgery, on account of the risks of prosecution." "Doctors are so reluctant to treat a case of fracture among the poor in this city, that frequently they go a begging from one physician to another. One recently went the rounds twice before he could induce a physician to go."

It is not uncommon for the patient to threaten to prosecute if the surgeon attempts to enforce his bill, knowing there are a plenty of lawyers who will defend without pay, on the venture of unearthing some mistake, upon which to commence a suit for malpractice. One surgeon sued a bill $20 for fractured arm in a child. Defense set up that the arm was never broken, or if broken it was done by the surgeon. The surgeon got judgment of $10, but he reports that it cost him $200.

The risks of the practice of medicine are better illustrated by an example. Mr. Smith or family is stricken down with disease, meets with an accident, or has inherited or congenital deformity. The family physician, Dr. Jones, is sent for. It may be scarlet fever, inflamed eyes, rheumatism, a felon, fracture, dislocation, injury to back, hip or knee, club foot, benign or malignant growth. The doctor explains the liability to partial deafness or blindness, deformed joints, contracted fingers, shortened limbs, stiffened joints, hump back, hip disease, white swelling, feet partially restored, recurring tumors and amputations.

The patient gets out from a lingering illness permanently disabled, thankful to a kind Providence and the attentive doctor for what remains of a broken constitution and fortune. Rent and grocery bills stare him in the face, and neighbors afflicted as he has been seem in better condition. There is something wrong, sure. Lawyer Black doctors dilapitated estates, and is hungry for a tilt with some one. The squire's keen eye detects, at a glance, a bonanza. He knows Dr. Brown's weakness—jealousy. "Now Smith, you go home; say nothing outside, but make sure that your sisters, your cousins and your aunts can swear that you followed directions; give me a bill of sale of your cow, your horse or old chaise, borrow, if you can, from your maiden aunt or wife's mother, to pay witness fees, and you need not trouble yourself about my fees until we get through." The squire is very kind; but then he has sued the doctor for $10,000, and that will make us all rich, even if he gets the lion's share.

At the trial, the nursing babe, the care-worn wife, the decrepit old aunt and the unfortunate cripple are all paraded before a sympathetic jury. They all swear to the mark like a machine, excepting the baby, whose colicky screams are as effective as Dr. Brown's foreign pretentions and owl-like and oracular convictions that the wrong shoe was used, though he never used any other, and that a piece of flesh was cut out, or he never would have lost his leg from white swelling. The defense seems as tame as a suit for debt would in comparison to Beecher or Jimmy Hope trial. The jury do not discuss a principle of anatomy, physiology or pathology, but think the doctor can afford to pay the poor patient a little something. Disagreements, appeals, non-suits and settlements follow. The lawyer takes the cow, the doctor receipts his bill, or a small verdict is rendered, which the lawyer pockets and returns the animal. The client goes into insolvency and the doctor about his business, taking care to turn the next poor patient on to his less fortunate and less experienced brother physician.

In our last Legislature, of 183 members, nineteen were lawyers, ten of whom constituted the Judiciary Committee to which our bill was referred. This committee acted for the whole Legislature and reported against our measure without assigning reasons. It was reasonable to infer that their objections were as follows:

1st. The *existence* of a *general* law on our Statute book, authorizing any citizen to prosecute without providing for the costs or injuries legally inflicted. The pauper can sue the town doctor for imaginary damages, if some lawyer feels disposed to undertake the venture. The insolvent debtor, having used the law to clear his own indebtedness, can beggar the doctor with the costs of a fictitious suit. This committee was evidently unwilling to report a bill for a special law to correct the abuses of a *general* one, but, if any change must be made, would make a *general* law of the *special* one asked. Such a change would be open to the very same objections which now exist; that there are *exceptions* to all general principles and laws, which can be corrected in the interest of the greatest good for the greatest number in no other way than by *special* legislation. Because all trades and professions are liable to suits for damages, but are never prosecuted, is the strongest possible argument why the medical profession, constantly embarrassed by such suits, should be an exception, and be protected by a special law to correct abuses which threaten the existence of a class of general usefulness. Our Statute books are full of special laws. Towns are protected against action for damages, because such suits are full of hazard, as an eminent judge of this State once told me of medical malpractice suits.

2d. The next objection to reporting our bill was, that making the plaintiff responsible for taxable costs in medical malpractice suits would be *class* legislation. If all professions stood alike in the eyes of the law, and no special protection was accorded to any, the objection would be valid, but, if any profession is protected by class legislation, it should be the one the most exposed to danger. I have already reported the statistics of eighty suits against the medical profession, and not one recorded case against the legal and clerical professions, for like errors in judgment and mistaken opinions. The graduates in medicine are the peers of the legal profession, as well educated, as sound in judgment, as self sacrificing and as devoted as the latter. The very reason why the legal profession is not more frequently sued is because it is protected by the very same *class* legislation which it would deny to the medical profession.

It was originally intended that judges should hear complaints and issue writs for damages. This became onerous, and degenerated into the oppressive and dangerous practice of furnishing these writs, signed in blank, to any member of the bar, who is authorized, on his own *ipse dixit*, to attach property, arrest the person and send to jail, unless a bail bond is speedily obtained, without incurring any accountability whatever. The client may be entirely worthless, the charges frivolous and the damage to the accused very great, yet the attorney can not be made responsible, although he advised the suit contrary to his

convictions of right. By the exercise of a still greater privilege invested in him by *class* legislation, he can connive with his client to defraud the defendant without the risk of exposure.

The right of "privileged communication," as once told me by a judge in this State, gives the unscrupulous lawyer a terrible power to injure the medical profession, which is defenseless and without redress. The judge of a neighboring State wrote me that malpractice suits were infrequent in his State, because the bench and bar discouraged them. In short, the doctor is put, by *class* legislation, at the mercy of the lawyer. Dr. RUSSELL was sued for an ununited fracture of the fore-arm, and his body seized. There is a case now pending, where the attorney ordered an arrest of the physician for the relapse of a case of typhoid fever from imprudent eating. It seemed such a gross abuse of power that the sheriff assumed the risk of letting the doctor go at large on his own recognizance.

A physician in this city attempted to collect a bill of a female for gonorrhœa. The next day a lawyer demanded damages for insulting the woman, caused the summary arrest of the physician, and put him to a great deal of trouble and mortification to get bail. The woman became frightened, confessed she had a confederate, that the lawyer said there was money in it, and left the State, so that the lawyer had to endorse his own writ or drop the action. The doctor found he had no action against the lawyer for an attempt to blackmail him, so he wrung the eminent barrister's nose in the public square.

The lawyer is protected, by class legislation, in frivolous prosecutions of the doctor, but the doctor is denied the same legislation to repel these attacks on his reputation, skill and purse, because the lawyer, as a legislator, objects to *special* legislation for any class except his own. The lawyer should endorse his writs as the doctor has to his splints. The one *sues*, as the other *mends*, on the evidence presented. The State pays taxable costs in criminal cases, and the creditor endorses his suits for debt. The plaintiff becomes responsible in replevin suits, and in appeals from lower to higher Courts, why not in cases of tort or damage?

An influential member of the Senate told me that the lawyers of a legislature managed to defeat all laws not shaped in their interest, and that the pleas of *class* legislation, the protection of the *rights* of the poor, and *reckless surgery*, were specious reasons to delude the people. He advised us to have our bill referred to some other committee, as the bill was not a constitutional question, and, if we could get it before both branches for discussion, the truth would come out. The Chief Justice of a neighboring State once said that lawyers were bound to control the Statutes in their interest.

3d. The Judiciary Committee seemed to fear that our bill removed all checks to reckless surgery and exposed the people to experiments and quackery. The bill was carefully drawn, and applied to *graduates of medicine* only. It let empirics just where they are now. We object to being confounded with quacks and subjected to the same distrust and prosecutions. The lawyer may prosecute the quack as much as he pleases. The protection which our bill asked applied to those whose record of study, whose intelligence, education and moral worth were as good guarantees against empiricism as the best education afforded to the student of law and divinity. The recent suit against the Manhattan Eye and Ear Hospital was defended upon the decision of the Supreme Court of Massachusetts, that if a hospital had exercised due dilligence in selecting skillful and careful medical men for the treatment of its patients, it was not liable for any malpractice of which these men might be guilty. Judge LAWRENCE reaffirmed this decision. This, in substance, is what the graduate in medicine claims, that, having thoroughly educated himself, his diploma and record should be presumptive evidence of skill, and guarantee him against the *expense* of testing his qualifications, unless proven to be positively disqualified.

In 1835, the Thomsonians or Botanics got control of the legislature and repealed all restrictions, so that any one was permitted to practice medicine without study, certificate or diploma. If any one felt called to practice, he could do so simply being made liable to prosecution for doing badly what he was not educated to do, and did not know how to do, much loss to do well. The State might as well authorize theft because it had the right to punish. The science of medicine was made accountable for their blunders. The result was, our State became flooded with all kinds of irregulars and pretenders; botanic, root and herb, Indian, clairvoyant, spiritual, mesmeric and itinerant doctors. The law knows no distinction between the educated physician, with his diploma, and the mountebank. It subjects us to common distrust and confounds us in malpractice trials. The presumption of skill is against the educated, as they are presumed to be mineral doctors, barred by public prejudice from any credit for skill and knowledge. THOMSON, the father of the botanic system, was sued for killing a man by giving his "ram-cat dose," the powerful lobelia emetic, fourteen times in seven days. He was acquitted, on the ruling of the Judge, that the patient knew who he was employing and must take the consequence of a voluntary contract.

We have had two recent illustrations of the workings of the present law. An uneducated mongrel in a neighboring country had a case of footling labor. He could not extract the head, so he cut off the body at the neck. Then he could not get the head out. He attempted to fish it out with a pair of tongs, punched a hole through the womb, and killed the mother. A second one, a non-graduate, pulled off the cord in a case of confinement, and extracted what he called a veiled after-birth, leaving the woman to die with an

undelivered placenta. Both of these men practice medicine in this State to-day, unmolested. The latter has been recently indicted and tried; jury disagreed. There is a doctor of some kind to every 800 inhabitants in this State, while in England there is but one to every 1,600, in France, one to every 1,800, and Germany, one to every 3,000. A supply creates a demand. Easy access to a profession multiplies poor practitioners, who must create business or starve, so that, instead of a small number of good physicians—"one, but a lion"—interested in preventing disease, our State swarms with irregulars who illustrate SYDENHAM's axiom of killing more by the misuse of drugs than they cure by appropriate treatment.

The lawyer claims the need of *special* legislation to secure to his client an impartial trial. The bar is a close corporation, with rules of its own making to regulate the action of its own members. It is authorized by the State to judge of the fitness of its members, to admit, expel, and to establish rules of discipline, which neither judge nor attorney dare transgress. An eminent Chief Justice once told me—"You cannot get an attorney to sue another for damages." On the contrary, the State does not recognize the authority of medical societies and colleges to regulate the practice of medicine, to judge of the qualifications of physicians, and exclude the non-graduate and uneducated pretender from practice. The quack treats with contempt the discipline of societies, and appeals to the people, who have no means of discriminating between the skilled and ignorant so long as the State does not fix any standard, but authorizes any one to practice without a diploma. The State virtually holds the graduate responsible for the mistakes of the empiric, by confounding, in reproach and malpractice suits, the educated physician and the quack. It brings the former to the level of the latter, The State of Kansas, to prevent being overrun with quacks, passed a law last year requiring every doctor to have a diploma, or be examined by a committee chosen by the State Medical Society.

The lawyer, with his books of reference before him, makes mistakes in the allegations of his writs and his bill of exceptions. The doctor, called in an emergency to investigate an obscure disease, hidden within an impenetrable frame, and the varying theories of an uncertain science, must, of necessity, commit errors of judgment and make mistakes. The former is protected by the conventionalities of the bar; the latter is the legal prey of the former. The protection of the former by the State, and not the latter, begets safety and concert of action in the one, danger and disagreement in the other.

One of the first cases of malpractice tried in the State illustrates the perils of surgery, the mischief which lawyers may do to the profession, and the want, of adequate protection to one of the learned professions. CHAS. LOWELL, of Lubee, dislocated his hip. Sent for his family physician, Dr. FAXTON, and counsel, Dr. HAWKS, of Eastport. They reduced, as they supposed, a dislocation of the right thigh forwards into the foramen ovale. Some six or eight weeks afterwards, found right leg two or three inches longer than the left, Dr. HAWKS was staggered in his diagnosis and refused to visit the patient further. Thirteen weeks after the accident, LOWELL, consulted Dr. J. C. WARREN; at that time one of the four eminent surgeons in the United States. He, with the hospital staff, diagnosticated dislocation backwards into the lesser ischiatic notch. Failed to reduce it by the most heroic measures. At the first trial, Dr. NATHAN SMITH, a celebrity of the times, deposed "that it was a fracture of the pelvis, and the lengthening was owing to the preternatural contraction and relaxation of the muscles about the hip." Drs. HAWKS and FAXTON, were both sued, so that neither should testify, and plaintiff's family could furnish the surgical symptoms. Had three trials. First, verdict of $1,900; second, $100; third, acquittal of FAXON; disagreement in case of HAWKS. Judge WESTON interposed, and caused it to be entered "neither party." Years afterwards, after LOWELL's death, Dr. J. MASON WARREN, the son, procured a *post mortem,* and found them all wrong, The dislocation was directly downwards, with the formation of a new socket. Dr. J. C. WARREN's attempt at reduction was not as correct, in principle, as HAWK's and FAXTON's. Reasonable care and skill could not have remedied the accident, and the lawyers could not determine what they were sueing for until after a dissection of their client. The case bankrupted the plaintiff and cost Dr. HAWKS $2,000 or $3,000, which took years of hard labor to pay up. This case typifies the obscurity of surgical evidences, and the injustice of the law which allows any scallawag to test the skill of the surgeon at the latter's expense.

The State should be the custodian of the arts and sciences, foster and protect its skilled and learned men, if it desires to rise to greatness and make its influence felt in the galaxy of States, and not allow one profession to destroy another to avoid making exceptions to a general law.

The surgeon is in great peril from defective expert laws. Any person claiming the title of doctor, whether a graduate or not, can testify as an expert. The fact of not possessing a diploma may or may not have any weight with the jury. The lawyer oftentimes can not or will not post himself in a science so as to detect the errors of the expert, or he may not comprehend the suggestions of his client, but rely upon his wits and the tricks of his profession to expose to the jury what his unmeaning questions mystify. Text books and standard authors are excluded as evidence, leaving the field clear for the designing and ignorant witness to impose the most partisan vagaries upon the jury as wisdom. The Judges in some States select the medical experts, who come to the stand without bias or coaching.

I once heard a lawyer read the opinion of an eminent jurist to the jury, to prove that his witness, who had never performed certain kind of surgery, was better qualified by his theoretical knowledge, to testify, as to the merits of the different methods of operating, than the operator himself. I once heard a surgeon, a little confused on his anatomy, testify that a knowledge of anatomy was not essential to a good surgeon, but intended for medical students. On another occasion, a witness stated that he never heard that wall paper, besmeared with small pox virus, needed to be removed to avoid infection. Again, that incised wounds of discharging sinuses did not gape, but collapsed like a sucked orange; that the honeycombed cancellous tissue of a joint was not called white swelling; that the crack of a rib in an adult, without displacement, could be detected; that the partial stiffness of a reduced dislocation might lead to the withering and palsy of the arm; that an inch was not an unusual shortening for a fractured leg &c. Such testimony was intended for, and sometimes against, the medical defendant.

Quackery is largely confined to the professions of medicine and religion, because less capable of exposure or demonstration. Diseases are self-limited, and often restored without human aid. In many cases it is difficult to award the credit, whether to nature or the doctor. The same mysterious force that restores disease and deformity, may produce them. It is a difficult problem to solve, how much depends, upon the inherent powers of nature, or human skill, or whether the results are not in spite of the doctor, who may have retarded cures and hastened death.

It must be patent to everyone that the medical profession is held to a stricter accountability than any other. The clergy are not prosecuted, because their mistakes are tried at a Heavenly tribunal, beyond the Styx. The lawyer escapes, because his business is like the game of faro, where the combinations are in favor of the bank and the two biggest trumps, the bench and bar. Reasonable errors in writs and legal documents are evidences of human frailty, admissible in the prosecution and flattering to the defendant, who quashes them and clears his client. Tho mariner, engineer, scientist and mechanic charge to the hostile elements, topographical difficulties, defective instruments and material, their mistakes. Recovery of disease is made the standard of treatment, and all failures are evidence of malpractice!

In actions for damages, the client can not make his counsel accountable for malpractice; as it is a common venture, where the fee is dependent upon success, and the lawyer is protected from the betrayal of any agreement by the special law of "privileged communication." The claim, at best, is hypothetical, depending upon the verdict of a jury, and, where there is no award, it must be difficult to determine what loss the plaintiff sustains by the mistakes of his counsel, if any. The lawyer takes no risk, and has every incentive to contend for victory, which means, in many instances, highway robbery. In a neighboring State, a letter written by a criminal, confessing his guilt, was claimed by counsel as privileged, because originally written to his attorney. The attorneys in this State have abused the privilege to such an extent that a recent Legislature made certain forms of barratry penal. It does not remedy the evil, and cannot until client or counsel is made responsible for costs inflicted upon innocent persons. The least to be asked by the unconvicted accused is, that the plaintiff shall pay the costs of his own making.

Judge Russell, in a recent address, said, if the lawyer yielded to the temptation to argue for victory, at the expense of the right, the law is dishonored. The incentive to yield to such a temptation is so great in malpractice suits, that the only way in which the lawyer can guard his honor is to consent to a change of law, making the plaintiff responsible for costs wrongfully contracted.

It is this temptation, protected by law, that makes malpractice suits so frequent, dangerous and damaging, and enables the counsel of irresponsible plaintiffs to inflict serious damage upon innocent defendants without any accountability, except to share the spoils, for his services. While I am writing, I am served with a notice of insolvency on the part of one of the men who sued me for malpractice. He gave his lawyer a mortgage on his old horse, for money to start a frivolous and malicious suit against me, hoping, as he said, that he had struck a gold mine, and, from the costs which the proceeds of that old horse put me to, I thought he had. Now he is a bankrupt, and the attorney, who spent his horse in witness fees, hoping to rob me of a portion of my estate, is, in my opinion, no better than a horse thief, and ought to be hung.

Under the most shallow pretext of duty to client, these miserable pettifoggers can arraign, arrest, attach and trustee the property of the surgeon, keep him dancing on the courts for months, suborn testimony, blast reputation and character, and, when acquitted, set him down again in society an injured man, and defy him to get redress. The "*esprit de corps*" of this profession protects him, and one might as well try to follow a weasel into a rat hole as one of these attorneys into the devious windings of the law.

Now that the plaintiff can testify in his own case and on his own complaint, the ends of justice do not require any secrets between client and counsel. Both should be called to the witness stand, and, if there are any conspiracies to defraud the accused, the lawyer should not be allowed to skulk behind the protection of "privileged communication" to cloak his departure from right. If he wrongs the accused, he should be held as accountable as the doctor is to his patient. If such an end cannot be obtained, the right to sue in court for damages should be confined to those

who can be made responsible for the injury which the expense of a defense may cause. Such a course would work less injustice than the present system of multiplying suits without cause. It would be the least of two evils, and cause the least sacrifice of personal rights for the greatest amount of good. It would prevent lawyers from prosecuting on shares or venture and taking up cases which they had no faith in, and give the experienced surgeon the opportunity of practicing his art among the poor without the constant fear that some envious doctor, like the dog in the manger, unwilling to let others do what he cannot do himself, and some ambitious pettifogger, eager to ventilate his eloquence, might summon him before the courts to answer to a jury why he has not done impossible things, and restored every case of disease and injury. Might as well hold the clergy responsible for the moral obliquities of the backsliding convert, as to make the natural effects of disease and injury the consequence of medical treatment. A prominent surgeon writes, "suits are gotten up by rival and dishonorable practitioners and lawyers or pettifoggers."

If the people would inquire into the abuses of the Court Horse, if each individual could have a slight experience of the mockery of legal honesty and fairness, they would, like the iconoclasts of the reformation, topple from her pedestal the blindfolded maiden, weighing truth in a balance, as a symbol of justice, and erect in her place some hideous monster preying on the vitals of society. If they knew, as I have reason to, that lawyers will settle malpractice suits which they have encouraged and brought for their fees, canvass for others, communicate with jurors before and during trials, approach them with the seductive glass, introduce female witnesses into the jury room, have out emissaries, suborn witnesses, threaten medical experts who do not testify to their liking, parade congenital deformities in the court room, introduce inadmissible testimony for its effect, prejudice juries with false statements, assail the character of the accused in argument, take suits on shares, and then shield themselves from personal responsibility and the witness stand, where such crookedness would be exposed under the aegis of a *special* law which hides such iniquities; if the people knew half of the tricks of the trade, the law would be changed or the court houses closed; the legal profession would be shorn of its power of doing harm and the medical profession granted the power of doing good. One surgeon, who was sued and acquitted, writes, "lawyers are always ready to bring action, whether just or unjust." A distinguished lawyer once said to me, "he always gave his clients good advice, but, if they were determined to sue, brought the action if there was a prospect of any money in it."

About a month before the annual meeting of this Association, I sent a circular to the profession, making the inquiry whether the present law deterred them from practicing among the poor, and whether they would exert their influence and circulate a petition to the next Legislature for a change of the law, also calling for a report of all suits instituted or threatened against the profession, and cases of blackmail. I issued 650 circulars and received 233 replies. Ninety-nine were members of this association, 134 were not. Fifty-two members had been sued or threatened, and fifty who were not members. This Association numbers about 272 members, all of whom are presumed to be committed to the unanimous vote of the society for a change of the present law on malpractice. Add to this number the 134 who are not members, and we can enumerate 407 who are pledged to a change.

It was difficult to get reports from those who were known to have been threatened and sued. By various devices, I have collected eighty cases of malpractice suits, which, I think, exhausts the count, I have reports of 118 threatened suits, and twenty-eight where sums of $10 to $250 were paid or bills remitted to avoid litigation. If I could get a full report, I think I could have doubled the number of threatened suits, and had a united profession of 650 strong, who believed that the profession needed protection to enable them to practice medicine successfully.

Gentlemen, we are 407 strong, who are committed to the work, who have pledged our influence and our efforts for a reformation. We are two-thirds, if not a solid phalanx, for a change of the law on malpractice, If we stick together, if we are not weakened by discord and jealousy, if we act with a will and one accord, our influence must be felt. Our influence at home is as great or greater than the lawyers'; we are engaged in a more laudable pursuit, one that appeals to the sympathies and affections of the people, one that administers to the sick and afflicted, and one that the people will not allow to languish because the legal fraternity wish to fatten us for the slaughter.

Sadder than all, gentlemen, are the thirty-four instances where eminent surgeons have given up the practice of surgery among the poor, on account of the repeated threats against, and prosecutions of, our profession, cases, too, where educated surgeons have been arrested on frivolous charges, sued on surgeons warranty, worried into their graves, driven out of the State to avoid the payment of unrighteous verdicts, been put to great anxiety and large expense to meet the machinations of schemers, and where lawyers have extorted money or driven us into litigation.

Can the state afford to lose the services of such men? Can it afford to see a science and art languish, because a few vicious demagogues and pettifoggers call it *class* legislation to protect one of the most necessary and useful arts in existence, and object to special laws or any exceptions to general ones, to save from destruction, the medical profession, who have devoted their lives to the study of disease and the healing of the sick?

Nothing can be accomplished without effort. Every year our movement grows in strength, as the people and legislators realize our perilous condition and the abuse of the present law. The profession have become aroused and urge a renewed effort. I have received numerous letters acknowledging their indebtedness, thanking me for my manly defence of the profession, and offering their co-operation in a united effort to get the law changed.

Although there is considerable disturbance in the political horizon, and though the Legislature may not be of the complexion, or in the mood to deliberate upon an abstract question, yet the subject should not be allowed to slumber, lest the golden opportunity be lost. In consideration, therefore, of the numerously signed petitions, the urgent and unanimous desire of our professional brethren, and the interest manifested abroad in our success, we would recommend that a committee of sixteen, one from each country, be chosen to canvass the State and present the subject to the next Legislature for action. We hope, with the pledges already received, and the feeling that a bill should be reported, that our efforts will be crowned with success.

BANGOR, NOVEMBER, 1879.

Sickness prevented me from being present at the June meeting of the Association, and presenting my report in person. It was deferred until the eve of adjournment, in hopes that I might put in an appearance, and then referred to the committee on publication.

About two-thirds of the medical profession are not members of the Association and do not have access to the printed "Transactions" and yet are deeply interested in and pledged to the enactment of a malpractice law such as will protect both patient and doctor.

For the benefit of such I have issued extra copies of my report, and, after perusal, if the profession throughout the state are still of the opinion that the subject should be presented to the next Legislature, I am willing to co operate with a committee, one from each country, to press our claim.

Physicians interested in the cause should write to me at once indicating their willingness to assist, and naming some physician from each country who would be willing to superintend the work of the country and advocate it before the Legislative committee. It should be the duty of every physician to explain the matter to his representative.

EUGENE F. SANGER.